

## ***5 Official Opinion of the Compliance Board 76 (2006)***

### **OPEN SESSION REQUIREMENT – CONDUCTING DISCUSSION AFTER INFORMING SOLE MEMBER OF AUDIENCE THAT MEETING WOULD BE CLOSED, HELD TO BE A VIOLATION**

October 17, 2006

*Leanne Pfautz*

The Open Meetings Compliance Board has considered your complaint that the Mayor and Council of the Town of Kensington violated the Open Meetings Act on July 3, 2006 by conducting an improperly closed meeting. For the reasons explained below, we find that the Council violated the Act when it effectively deprived an attendee of the opportunity to observe a portion of the meeting.

## **I**

### **Complaint and Response**

According to the complaint, the Mayor and Council conducted an organizational meeting on July 3, 2006.<sup>1</sup> This was open to the public. Well into the meeting, however, the Mayor asked that it be closed to discuss a personnel issue. The complaint alleged that no advance notice of the closed session was provided, no vote was conducted to close the meeting, and no arrangement was made for the production of minutes. According to the complaint, “a resident [in attendance] was asked to leave and the door to the Council room was closed. After some conversation about whether discussion should continue at a future time in order to satisfy procedural requirements to close a meeting, the Mayor and Council proceeded to discuss a personnel matter (salary increases) and take a vote on the Mayor’s recommendation that a cost of living increase be given to two Town employees.”

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<sup>1</sup> The Kensington charter requires that, after a town election, the Council hold an organizational meeting on the first Monday in July. Town of Kensington Charter, § 405. The charter provides that the Mayor serves as president of the Council but is entitled to vote only in the event of a tie. § 406.

The complaint went on to indicate that the Mayor proceeded to appoint an advisory committee to the Maryland County Park and Planning Commission “on an issue of keen interest to Town residents but because it was done in ‘closed’ session, the opportunity for public input was not provided.” The complaint noted that this topic was not within the scope of any exception initially cited when closing the meeting had been discussed. The complaint referred us to a tape of the meeting available through the Town’s website.

In a timely response on behalf of the Town, Suellen Ferguson, Esquire, recited the events of July 3. The Mayor and one Council member had just taken office at the end of June, and this organizational meeting was the Mayor’s first opportunity to chair a Council meeting. Items generally considered at the organizational meeting include the Mayor’s goals for the year, the meeting schedule, election of a Mayor Pro-tem, the Council’s duties, and the membership of various Council committees. The meeting was advertised in accordance with the Town’s usual procedures. In addition to the Mayor and Council members, two people were in attendance at the start of the meeting, but one had left before the events resulting in the complaint.

About an hour and 45 minutes into the meeting, the Mayor indicated a desire to discuss a personnel matter, involving the pay of specific employees, that he believed required a closed session. “At that point, the Council believed it would go into closed session. Mr. Doherty, the only member of the public present, was asked to leave the room, which he did without objection and the door was closed. Nothing was said to this individual about whether the Mayor and Council would return to in open session once the personnel matter was discussed and no vote to actually close the session was taken.”

After the door was closed, a discussion ensued on “whether a closed session was appropriate,” and it was soon decided that it was not. However, the Mayor and Council also decided to discuss “a limited portion of the personnel issue in open session, due to its pressing nature.” Although the door was immediately reopened, Mr. Doherty had not remained. The Mayor and Council then considered the issue of a redistribution of pay raises decided by the former Mayor. Part of the discussion was whether the pay adjustments required the Council’s approval. According to the response, “the sense of the conversation amongst the Council ... was that the current Mayor was not required to [seek Council approval.] In the end, the Council deferred to the Mayor on this executive function and voted to approve the raises, as [the Mayor] requested.”

Discussion then turned to the appointment of a community advisory committee concerning the Circle Manor property, a historic site within the town owned by Montgomery County. The Mayor discussed a list of potential members and requested Council members' input. "The Mayor did not request a vote of the Council as to the membership of the committee, as none was required. After discussion on this issue, the meeting adjourned."

The Council's position is that the matters considered after the aborted decision to close the meeting – that is, decisions regarding salary adjustments and appointments to an advisory committee – were merely informational, a means by which the Mayor sought Council comment on matters under his authority. Moreover, according to the response, "the complaint does not recognize that the Mayor and Council determined it was not appropriate to go into closed session, and so resumed their meeting after opening the door, without discussing any substantive issue in the interim. The fact that the only member of the public who had been in attendance had left does not make the meeting a closed one." The Council also observed that appointments to committees involve an executive function to which the Open Meetings Act does not apply.

## **II**

### **Analysis**

We must first address the Council's position that its discussion involved an executive function and, therefore, the Open Meetings Act did not apply. *See* § 10-503(a)(1)(i).<sup>2</sup> Based on our review of the recording, which the Council has commendably made available on its website, we reject this argument.<sup>3</sup> The discussion after Mr. Doherty was asked to leave addressed, in part, policy considerations (for example, the manner in which pay adjustments should be

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<sup>2</sup> All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland. Effective October 1, 2006, the term "executive function" was changed to "administrative function" without any change in the scope of the exclusion. Chapter 584, Laws of Maryland 2006. However, in this opinion, we use the terminology and statutory references as they appeared in the Act on the date of the alleged violation.

<sup>3</sup> A review of the recording indicated some uncertainty among Council members about the process to close a meeting, namely that the written statement required under § 10-508(d)(2)(ii) be completed *before* closing a meeting. Considering the change in membership of the Council, we suggest that the body review with its legal counsel the substantive and procedural requirements of the Act.

handled in the future and the role of the Council in the process). This policy-oriented discussion cannot be considered an executive function. § 10-502(d) and (f).<sup>4</sup>

Consequently, we consider whether the discussion in fact occurred at an open meeting. The fundamental purpose of the Open Meetings Act is to grant to the public the opportunity, subject to limited exceptions, to observe the meetings of a public body. § 10-507(a). Unless it has a lawful basis for closing a meeting, “a public body shall meet in open session.” § 10-505.

What does it mean to “meet in open session”? As we recently wrote, “The Act requires an open meeting to be open in practice, not just in theory.” 4 *OMCB Opinions* 147, 152 (2005). In that opinion, we found a violation when a committee of the House of Delegates met in an area marked as off-limits to the public. It was irrelevant that, theoretically, a member of the public could have gained admission by disregarding the sign. At the least, the sign improperly discouraged public attendance. In the same practical vein, we have found violations when a presiding officer indicated that a meeting was adjourned or recessed and then discussions among the members continued. 4 *OMCB Opinions* 63, 65 (2004); 1 *OMCB Opinions* 178 (1996); 1 *OMCB Opinions* 162 (1996); 1 *OMCB Opinions* 178 (1996). A public body or its presiding officer may not act so as to lead a reasonable member of the public to believe that open discussion is over when in fact it continues.

In this case, a member of the public, Mr. Doherty, left the premises after being led to believe that the remainder of the meeting would be closed. This was surely a reasonable belief: He was asked to leave, the door was closed, and the agenda listed a closed session as the last item. Conversely, he had no reason whatever to believe that, had he chosen to linger, he would have been able to observe the Council’s discussion. He cannot be expected to have made a lucky guess that, despite what had happened, he could resume his place in the audience.

The Council’s response included this comment: “The fact that the only member of the public who had been in attendance had left does not make the meeting a closed one.” True enough, in general: The departure of the audience does not by itself convert an open meeting into a closed one. But not true here: *Under these circumstances*, the Council’s continuation of its discussion was a violation of the Act’s openness requirement.

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<sup>4</sup> We have repeatedly set forth the test for applying the executive function exclusion and believe it unnecessary to repeat it here. See, e.g., 5 *OMCB Opinions* 42, 44 (2006).

**III**

**Conclusion**

We hold that the Kensington Town Council violated the Open Meetings Act when it continued its meeting after a member of the public was asked to leave the meeting, under circumstances creating the impression that the remainder of the meeting would be closed.

OPEN MEETINGS COMPLIANCE BOARD

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